STATE OF MICHIGAN

COURT OF APPEALS

TRACY L. HAYLEY formerly known as TRACY L. MARTIN, Plaintiff-Appellant,	UNPUBLISHED July 23, 2013
v	No. 310504 Wayne Circuit Court Family Division
DANIEL B. MARTIN, Defendant-Appellee.	LC No. 07-705347-DM

Before: STEPHENS, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting in part and denying in part her motion to modify custody and parenting time. For the reasons set forth below, we remand for further proceedings consistent with this opinion.

I. LEGAL CUSTODY

The trial court awarded sole physical custody of the minor child to plaintiff, and joint legal custody. Plaintiff first argues that the trial court committed error requiring reversal when it failed to address MCL 722.26a, the statute concerning joint custody, and failed to comply with the statutory requirements, including stating on the record its reasons for awarding joint legal custody. We conclude that the trial court did not make sufficient findings on the record regarding its determination of legal custody. Accordingly, we remand to the trial court with instructions to conduct an analysis on the record regarding whether sole legal custody with plaintiff is proper.

Custody orders "shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28; *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010). Under the "great weight of the evidence" standard, the "trial court's determination will be affirmed unless the evidence clearly preponderates in the other direction." *Pierron*, 486 Mich at 85. "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Keinz v Keinz*, 290 Mich App 137, 141; 799 NW2d 576 (2010). Questions of law are reviewed for clear error, which occurs when the trial court "incorrectly

chooses, interprets, or applies the law." *Dailey v Kloenhamer*, 291 Mich App 660, 665; 811 NW2d 501 (2011).

MCL 722.26a provides:

> (1) In custody disputes between parents, the parents shall be advised of joint custody. At the request of either parent, the court shall consider an award of joint custody, and shall state on the record the reasons for granting or denying a request. In other cases joint custody may be considered by the court. The court shall determine whether joint custody is in the best interest of the child by considering the following factors:
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> (a) The factors enumerated in [MCL 722.23].
>
> (b) Whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child.
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> * * *
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> (7) As used in this section, "joint custody" means an order of the court in which 1 or both of the following is specified:
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> (a) That the child shall reside alternately for specific periods with each of the parents.
>
> (b) That the parents shall share decision-making authority as to the important decisions affecting the welfare of the child.

"When ruling on a custody motion, the circuit court must expressly evaluate each best-interest factor and state its reasons for granting or denying the custody request on the record." MCL 722.26a; *Dailey*, 291 Mich App at 667.

"Although not specifically designated in the statute, the custody described in [MCL 722.26a(7)(a)] is commonly referred to as joint physical custody, and that described in [MCL 722.26a(7)(b)] is referred to as joint legal custody." *Dailey*, 291 Mich App at 670. In deciding whether to grant joint legal custody, or "decision-making authority as to the important decisions affecting the welfare of the child," MCL 722.26a(7)(b), the trial court must consider "[w]hether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child," MCL 722.26a(1)(b).

The trial court did make factual findings during its discussion of the best interest factors. For example, discussing MCL 722.23(j), the "willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents," the trial court found that defendant "has not been communicating appropriately regarding parenting time and putting [the minor child's] needs first," and "demonstrate[s] he is more concerned about [plaintiff] not having anymore [sic] overnights than [about the minor child's] needs and desire to be with [plaintiff] when [defendant] is unavailable for parenting time." Defendant "refuses to communicate if he is going to be

attending activities and sports when asked by Plaintiff," and "has made unilateral decisions regarding signing [the minor child] up for activities which have interfered with [plaintiff's] parenting time."

However, considering MCL 722.23(a), the "love, affection, and other emotional ties existing between the parties involved and the child," the court noted that "[b]oth parties have love, affection and other emotional ties between them and [the minor child]," and "the parties have shared joint legal and joint physical custody of [the minor child] since 2007" and "have consistently exercised their parenting time . . . ." Considering MCL 722.23(b), the "capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any," the court found that "[t]he parties are both involved in [the minor child's] life and have provided love and affection." Although defendant's decision to attend the same church as plaintiff makes her uncomfortable, the court found that "it does provide for consistency for [the minor child]." Defendant "testified that he is highly involved in all activities that [the minor child] does[,] including scouting, soccer, baseball, kayaking and canoeing. [Defendant] testified that he takes [him] to Lifetime Fitness, on boating excursions, and . . . takes [the minor child] to work with him occasionally."

On the other hand, defendant was "in denial" that the minor child struggled with reading, causing the court to be "concerned that [defendant] will acknowledge future needs and assist and guide [him] as needed in the future." Defendant "demonstrated poor judgment when it comes to [the minor child's] safety" and showed "impaired judgment by his repeated responsibility for his actions which have lead to [personal protection orders] against him, contempt of court, parenting time violations, CPS investigation and charges of '[c]ontributing to the [d]elinquency/[n]eglect of a [m]inor.'"

We do not dispute that the trial court made factual findings. However, the trial court never explained why those findings supported a determination of joint legal custody. After making its findings, the trial court simply concluded, in a conclusory manner, that joint legal custody was proper. The trial court never explained why it believed its findings supported a conclusion that plaintiff and defendant should share "decision-making authority as to the important decisions affecting the welfare of the child," MCL 722.26a(7)(b), or "[w]hether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child," MCL 722.26a(1)(b). Without a record applying its factual findings to the standards for assigning legal custody, we cannot determine whether the trial court committed reversible error.

II. ATTORNEY FEES

Plaintiff next argues that the trial court abused its discretion when it denied plaintiff's request for attorney fees. Because the trial court failed to address plaintiff's request for attorney fees, we remand for consideration of that request.

"We review a trial court's decision whether to award attorney fees for an abuse of discretion, the trial court's findings of fact for clear error, and any questions of law de novo." *Loutts v Loutts*, 298 Mich App 21, 24; 826 NW2d 152 (2012). "[F]ailure to exercise discretion

when called on to do so constitutes an abdication and hence an abuse of discretion." *Id.* (internal citations and quotations omitted).

MCR 3.206(C) provides:

> (1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.
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> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that
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> (a) the party is unable to bear the expense of the action, and that the other party is able to pay, or
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> (b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

"This Court has interpreted this rule to require an award of attorney fees in a divorce action only as necessary to enable a party to prosecute or defend a suit." *Loutts*, 298 Mich App at 24. "The party requesting the attorney fees has the burden of showing facts sufficient to justify the award. This would include proving both financial need and the ability of the other party to pay, as well as the amount of the claimed fees and their reasonableness." *Ewald v Ewald*, 292 Mich App 706, 725; 810 NW2d 396 (2011) (internal citations omitted).

With respect to MCR 3.206(C)(2)(a), which allows for attorney fee awards based on financial need, plaintiff alleged that she was

> unable to afford the costs and attorney fees incurred in the bringing and arguing of this [m]otion directly related to [defendant's] failure to adhere to the oral commitment he had made as to custody and also directly related to the [defendant's] ongoing harassment of [plaintiff] in violation of the [c]onsent [j]udgment of [d]ivorce[,] which has resulted in multiple [m]otions being subsequently heard by this Court. In addition, [plaintiff] is in Chapter 13 bankruptcy[,] which will not expire until approximately May, 2014.

She did not allege that "the other party is able to pay." MCR 3.206(C)(2)(a). But because this Court has been reluctant to foreclose a domestic-relations litigant's opportunity to receive need-based attorney fees because of faulty pleadings or a dearth of record evidence,[1] we remand for an

[1] In *Ewald*, the defendant appealed the trial court's order granting her only part of the attorney fees she incurred during her divorce proceeding. This Court found that "[t]he record establishes defendant's financial need, at least through the implementation of the marital-property division, and that [the] plaintiff had the ability to pay." *Ewald*, 292 Mich App at 725. However, remand was necessary because the "defendant failed to present evidence in the trial court to establish the amount and reasonableness of the attorney fees claimed." *Id.* at 726. On remand, the defendant

evidentiary hearing to determine the amount of fees claimed and their reasonableness, and defendant's ability to pay.

It is also clear that a trial court's unsupported denial of attorney fees does not "address" a party's request. See *Loutts*, 298 Mich App at 25 (holding that the trial court erred by "fail[ing] to address [the] defendant's request under MCR 3.206(C)(2)(a) by considering her ability to pay her fees relative to [the] plaintiff's ability to pay"). Because the trial court in this case did not state its reasons for denying plaintiff's request for attorney fees, it did not "address" that request, and therefore abused its discretion. See *Loutts*, 298 Mich App at 24 ("[F]ailure to exercise discretion when called on to do so constitutes an abdication and hence an abuse of discretion.") (internal citations and quotations omitted).

Plaintiff may have also stated a valid request for attorney fees based on defendant's "refus[al] to comply with a previous court order." MCR 3.206(C)(2)(b). The reasons for plaintiff's motion were multiple: that defendant refused to follow an oral agreement to modify the custody order during the school year, that defendant abused plaintiff in front of the minor child, that plaintiff agreed to the consent judgment of divorce "based on [sic] part upon the false premise that once the parties were divorced that they would be able to communicate effectively" and there was a "total breakdown" in their ability to communicate, and defendant continued to abuse and harass plaintiff in violation of the consent judgment of divorce and personal protection orders.

In her trial brief, plaintiff noted that she obtained a second personal protection order on May 13, 2010, which she moved to extend on August 10, 2010, "because of [defendant's] disregard of the prior [p]ersonal [p]rotection [o]rder as well as the Family Wizard Order," referring to the September 25, 2009, order that permitted communication between the parties solely using the Our Family Wizard system. Plaintiff also complained that defendant "repeatedly interfered" with her parenting time in violation of the consent judgment of divorce. Whether MCR 3.206(C)(2)(b) authorizes holding defendant responsible for plaintiff's attorney fees for the totality of the five-day evidentiary hearing on her motion, facially unrelated to defendant's noncompliance with court orders, is doubtful. The trial court should consider this question on remand as an alternative to the need-based award.

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Kurtis T. Wilder
/s/ Donald S. Owens

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was "to provide the evidence necessary to meet her burden of proof with respect to her need and [the] plaintiff's ability to pay, and the amount of the fees claimed and their reasonableness." *Id.* (internal citations omitted).